

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7640 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and  
MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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UNION OF INDIA

Versus

RD RAJYAGURU

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Appearance:

MR JJ YAJNIK for Petitioners

MR PH PATHAK for Respondent No. 1

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CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 28/01/98

ORAL JUDGEMENT

Rule. Mr.P.H.Pathak appears and waives service of Rule on behalf of the respondent. In the facts and circumstances of the case the matter is taken up for final hearing to day.

This petition is filed against the judgment and order passed by the Central Administrative Tribunal, Ahmedabad Bench on March 27, 1997 in O.A.No.893/95. In the operative part of the judgment, the Tribunal issued following directions:

" The respondents are directed to work out the total number of years of qualifying service rendered by the applicant between June 1956 and December 1968 deeming the break in service between December 1968 and July 1977 as condoned. The number of years of qualifying service so worked out shall be added to the qualifying service rendered by the applicant after reappointment in July 1977 and upto March 1992 i.e. Superannuation. If the total qualifying service put together comes to ten years or more, the respondents shall calculate the pension payable to the applicant according to rules and issue necessary orders. This exercise shall be completed by the respondents within a period of three months from the date of receipt of a copy of this judgment. It is made clear that the applicant will be eligible for only the pension worked out as directed above and shall not be eligible for any other reliefs which he has already foregone.

The application is disposed of accordingly. No order as to costs.

The respondent is original applicant before the Central Administrative Tribunal ("CAT" in short). He filed the above application for an appropriate order directing the respondents to give him benefits of pension by declaring his past service as continuous and to extend all the benefits on that basis. It is the case of the Union of India that after holding departmental inquiry, the workman was removed from service. It is asserted that the said action of removal was confirmed in appeal. From December 1968, the respondent was not in active service of the Union of India. Only in July 1977, i.e. after about 10 years, he was appointed afresh. It is the case of the respondent that thereafter he continued in service till he reached the age of superannuation. He retired in the year 1992. It was his case that his past service ought to have been taken into account for pensionary and retiral benefits and he could not have been treated as appointed afresh in July 1977. He, therefore, approached CAT and as stated hereinabove, CAT allowed that application by granting the benefits.

We have heard learned counsel for the parties. It was submitted by Mr. Yagnik on behalf of the Union of

India that the Tribunal has committed an error of law apparent on the face of the record in granting benefits by directing the Railway administration to consider the past service of the respondent. He submitted that after departmental inquiry, when the workman was terminated by way of penalty by passing an order of removal and after about 10 years he was appointed afresh by giving fresh appointment order, it was not open to the Tribunal to direct the Railway Administration to treat past service as continuous for the purpose of pensionary benefits. The order, therefore, deserves to be quashed and set aside.

Mr. Pathak, on the other hand supported the order passed by the Tribunal. He submitted that in undoubted exercise of power under the Administrative Tribunals Act, 1985 and after considering various decisions of the Supreme Court, of the Bombay High Court, and also a decision of Full Bench of Jabalpur Bench of CAT, the Tribunal passed an order by issuing necessary directions. The Railway Administrative could not have any grievance against such order which was legal, just and proper. He also submitted that as stated in the affidavit-in-reply, the order was ad. invitum passed on the basis of a concession made by the counsel for Railway. A request was, however, made to the Tribunal not to record concession and the order was passed which may not be interfered with now.

On merits, Mr. Pathak submitted that even after so called fresh appointment in July 1977, the employee is entitled to pensionary benefits as in according with law such benefits would be available if the employee completes service of 10 years or more. In the instant case, fresh appointment was given in July 1977 and the employee retired in 1992. Thus, he had completed more than 10 years of service. He, therefore, submitted that the petition deserves to be dismissed.

In the facts and circumstances of the case, in our opinion, the petition should be partly allowed. Looking to the order of CAT, it is clear that the judgment is based on a decision of the High Court of Bombay in *Baldan Khan vs. Assistant Security Commissioner, R.P.F.* W.P.No.3598 of 1991 decided on 11.8.1993 in which the Court observed;

"Admittedly, fresh order of appointment was issued in favour of the petitioner when he was overaged by relaxing the condition relating to

age. Since the condition of age was relaxed in favour of the petitioner, we asked the Respondents counsel as to why they should not condone the break in service. To this there was hardly any reply. In fact, the order of the Director General (R.P.F.) proceeds on the basis that no representation was made for condoning the break in service and we do not find break in service and they have such a power under the Rule of Manual of Railway Pension Rules, 1950, particularly Rule 47(iii).

Shri Nathan, learned counsel appearing for the petitioner, brought to our notice judgment of the Supreme Court in Civil Appeal No.3479 of 1991 arising out of Special Leave Petition (C) No.4833 of 1991. In this matter notice was issued on the Special Leave Petition confirmed to the question as to whether the petitioner would be treated to be in continuous service between 1965 and 1968 for the purpose of pension only. This was the case where the appellant before the Supreme Court was removed from the service following a disciplinary action in 1965 and on a representation made by him, he was called back to work in 1968 and superannuated in 1987. The break in service affected his pension. The Supreme Court observed that whatever may be the reason for his reemployment, respondents obviously condoned the lapses in calling him back to duty and it is a usual relief available in these circumstances to give continuity of service for purposes of pension. The facts are similar in this case or they stand on a better footing. It is not in dispute that the respondents condoned the lapses on the part of the petitioner by giving him fresh appointment, and as the Supreme Court observed, it is a usual relief available in these circumstances to give continuity of service for the purposes of pension, more so, when there is power, we find that this is a hard case where petitioner will have to be granted the relief which he has asked for.

Hence, we accordingly grant relief to the petitioner with regard to the continuity in service ... for purpose of pensionary and other benefits....."

The Tribunal also relied upon two decisions of the Supreme Court in Sushil Kumar Yadunath Jha vs. Union of India and another, AIR 1986 SC 1636 and U.P.Awosevam Vikas Parishan & ors. vs. Rajendra Bahadur Srivastava and another, (1995) Supp (4) SCC 76. The Tribunal was of the opinion that though action was taken by way of penalty and punishment and the employee was removed from service and thereafter fresh appointment was given, yet the Supreme Court held that past services of the employee could not be ignored and accordingly granted pensionary benefits by considering past services.

Reading both the decisions, however, we are constrained to observe that in neither of the cases, the Hon'ble Supreme Court was concerned with punitive action and yet an order was passed directing the employer to treat past services as continuous one. In the former case i.e. Sushil Kumar Yadunath, from para 3 it is clear that the employee was appointed on probation for a period of one year. His services were found to be satisfactory and he was continued after expiry of the period of probation. On February 29, 1968, however, his appointment was terminated suddenly. He made representation against the termination of his service on March 8, 1968 and few days later, he was informed that an appointment letter would follow and in fact a fresh appointment with effect from June, 1968 was made in his favour intimating him that no benefit of previous services rendered by him would be admissible. Considering the above facts, the Court in para 5 observed

"There is no doubt that his services were terminated, but the grounds on which they are said to have been terminated have subsequently not been found to be such as to constitute a permanent deterrent to a favourable consideration of the appellant's case. ....It is true that the terms on which he was appointed afresh expressly stated that he would not be entitled to continuity of service, but we must have regard to the circumstances in which he accepted those terms. He was in no position to bargain for a better deal and in the straitened circumstances in which he found himself he was compelled to accept whatever was dictated to him. ....Having regard to the interests of justice and in all the circumstances of this case we are of opinion that the appellant is entitled to an order condoning the break in his service and holding that he should be considered as

continuing in service throughout from the date of his original appointment. We order accordingly."

Thus, from the facts it is abundantly clear that the case was of simple termination. In the facts and circumstances of the case, the Court was satisfied that the action taken by the authority was clearly illegal and the employee could not have been deprived of legitimate benefits of his past services. In our considered opinion, the ratio laid down in that case would not help the employee in the instant case.

Even in the latter case, the action was of termination simplicitor. From the facts stated in para 2 of the reported decision, it is clear that the employee was appointed on November 15, 1966 and his services came to be terminated on December 31, 1971 with immediate effect on payment of one month salary in lieu of notice. Thereafter, he submitted representation to the authorities on September 20, 1977 and he was given an appointment subject to the condition that it would be a fresh appointment. A consent letter was taken from the Employee which read thus:

"In pursuance of the D.O. dated 7.9.1977 mentioned in the said letter I give my consent subject to the conditions contained therein, that my service tenure would start afresh and will not claim benefits of my past services. My joining w.e.f. 3.5.1986 may kindly be accepted."

Pursuant to the said letter, he joined services on May 3, 1986. He thereafter filed W.P.No.6644 of 1991 in the High Court stating therein that his termination in 1971 was illegal and that he should be granted all consequential benefits. The High Court allowed the petition and the employee approached the Supreme Court. Partly allowing the appeal of the Employer, the Supreme Court held that though other benefits ought not to have been given by the High Court to the employee, he was entitled to computation of period from the date of his initial appointment for pensionary benefits only and no further.

Thus, in the second case also, the court was concerned with a case of termination. Even though the petition was allowed by the High Court granting all benefits the Supreme Court observed that other benefits ought not to have been awarded by the High Court in exercise of powers under Art.226 of the Constitution of India, and a limited relief regarding pensionary benefits

was allowed.

In the instant case, as stated above, disciplinary proceedings were initiated against the employee and, he was removed from service. That order had become final. About 10 years had gone thereafter. A fresh appointment was given to the workman in July 1977 and in 1992, the respondent retired. Then in the year 1995, he filed A.O.No. 893/95 for certain benefits. In our opinion, in these circumstances, the Tribunal has committed an error of law in relying upon the decisions of the Hon'ble Supreme Court and in granting relief. To that extent, the order is vulnerable and deserves to be quashed and set aside.

So far as consent is concerned, there is nothing on record. In the judgment also, it is nowhere stated that a concession was made. It was submitted by Mr. Pathak that if this court grants time, he could file an application before CAT stating therein that a concession was made and that a request was made by the counsel for Railway Administration not to record the consent in the judgment. In our opinion, when there is no mention of such concession in the judgment, the prayer cannot be granted. We, therefore, reject the request.

Mr.Pathak further submitted that as observed in the impugned judgment, there was a decision of the Jabalpur Bench of CAT in O.A.No.395/91 wherein similar issue was decided. There also, the applicant joined as Ticket Collector on April 1, 1951 and he was removed from service after a disciplinary inquiry. Thereafter, he was reappointed as T.T.E as a fresh entrant by the Railway Department. After re-appointment, the applicant completed 16 years of service upto January 31, 1990 on which date he retired on reaching the age of superannuation. On his retirement, when the Railway Department did not grant benefit of past service on the ground that he was removed from service after disciplinary enquiry and he was reappointed as a fresh entrant in 1973, he approached CAT. Jabalpur Bench granted benefits to the employee.

Mr.Pathak submitted that in affidavit-in-reply, in para 3, the deponent has stated that against the order passed by Jabalpur Bench, the Railway Board approached the Hon'ble Supreme Court and the Administration failed. No copy of the order passed by the Hon'ble Supreme Court was produced or shown to us. We are, therefore, not in a position to state as to whether it was a speaking the order after recording reasons and confirming the grounds

on which Jabalpur Bench based its decision or there was merely a refusal to grant Special Leave to Appeal under Art.136 of the Constitution. In any case when the basis on which the Tribunal passed the order i.e. the ratio laid down in Sushil Kumar Yadunath Jha and U.P.Awosevam Vikas Parishan & ors. and when none of the cases related to a punitive action of removal and both the cases were of termination simplicitor, in our view, the order passed by the Tribunal deserves to be quashed and set aside and is accordingly set aside.

The last submission of Mr.Pathak, however, has substance and it must be accepted. Mr. Pathak stated that even after July 1977, when the employee was reappointed, he has completed service of more than 10 years as the employee reached the age of superannuation in 1992. In para 10 of the affidavit, it was stated that in view of the fact that the petition was disposed of, the applicant could not produce necessary records. In the facts and circumstances of the case, it would be in the interest of justice to remand the case to CAT on that question. The Tribunal will now give opportunity to both the parties and decide the question in accordance with law. Since the matter pertains to pensionary benefits of the employee the Tribunal is directed to dispose of the same as expeditiously as possible.

The petition is accordingly partly allowed to the extent indicated above. In the facts and circumstances, no order as to costs.

Dt. 28.1.1998. (C.K.THAKKER J.)

(R.P.DHOLAKIA J.)